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HOFSTRA'S FAMILY LAW WITH SKILLS COURSE: IMPLEMENTING FLER (THE FAMILY LAW EDUCATION REFORM PROJECT)

Andrew Schepard* and J. Herbie DiFonzo**

The *Family Law Education Reform Project (FLER) Final Report* documented that the current doctrinally oriented family law curriculum at most law schools does not adequately prepare students for modern family law practice. *FLER* recommended that law school courses move from the study of cases to the study of the legal system's effect on families, and integrate the study of alternative dispute resolution and interdisciplinary knowledge. In response, Hofstra Law School has made a comprehensive attempt to implement *FLER*'s curricular recommendations. This article discusses one major innovation – the Family Law with Skills course. Family Law with Skills is the basic course in Hofstra's revised curriculum and is designed to integrate doctrinal teaching with professional skills development. In addition to studying legal doctrine, students are required to engage in structured field observation of family court proceedings; interviewing, counseling, negotiation, and mediation representation exercises in a divorce dispute; direct and cross examination of a social worker in a child protection dispute; and drafting of a surrogacy agreement. The article describes each exercise and discusses its rationale, student reaction to the course, and lessons learned.

Keywords: *family law education; Family Law Education Reform Project; FLER; integrating skills and doctrine*

THE CHALLENGE OF FLER AND THE CARNEGIE REPORT FOR FAMILY LAW EDUCATION

In 2006, the *Family Law Education Reform Project Report (FLER Report)*, examined law school family law education and found it did not adequately prepare students for modern family law practice.¹ The *FLER Report* surveyed course texts and materials and the opinions of stakeholders—law professors, law students, judges, lawyers, mediators, social workers and psychologists—in the family law system. It documented a significant gap between the curriculum of the basic family law course and the skills needed for modern family law practice:

Today's family lawyers need a thorough understanding of many issues and practices that traditional family law courses rarely touch upon. These include the appropriate—and inappropriate—uses of dispute resolution processes, new case management techniques in the family courts, the key roles played by professionals from other disciplines in the court system, and current research on such issues as the effects of conflict and loss of parental contact on children. Yet the materials from which most family law professors teach contain nary a word on most of these topics or on the skills necessary for effective family law practice.²

The *FLER Report* identified three major directions for the future reform of family law education:

1. We encourage family law professors to shift from a course structure based on doctrine to one based on a hypothetical family or families and the issues they face over time.
2. We stress the interdisciplinary models of contemporary family law practice.
3. We emphasize the need to teach the role and methodologies of ADR, which has widely displaced traditional litigation in the family courts.³

The message of the *FLER Report* was reinforced by the message of the *Report of the Carnegie Foundation for the Advancement of Teaching (Carnegie Report)* which surveyed legal education

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overall, not just in family law. The *Carnegie Report* called on law schools to match “the first year’s . . . emphasis on well-honed skills of legal analysis . . . by similarly strong skill in serving clients and a solid ethical grounding.”⁴ It recommended that law schools “offer an integrated curriculum” that joins instruction in lawyering, professionalism and legal analysis from the start.⁵

THE CONCEPT OF FAMILY LAW WITH SKILLS

Both of us are law teachers with considerable teaching and family law experience. We separately taught a traditional three-credit, casebook oriented family law course over many years and, we believe, reasonably well. We also both taught in law school clinics and simulated skills programs. We were both heavily involved with the *FLER Report*—one of us as coreporter, and the other as the cochair of the overall project. We thus felt a commitment to try to implement its core principles in our own teaching.

We decided to join forces to create a new course to meet the challenges of *FLER* and the *Carnegie Reports* at our own institution, Hofstra Law School. This article is a report on our progress in creating Family Law with Skills, the name for our new *FLER*-influenced entity.

Our proposal for Family Law with Skills was the first time at our School that faculty tried to consciously integrate lawyer professional skills development into a traditional course like family law. We faced many challenges in shaping the curriculum for an integrated offering. Family law is a “core” course for many of our upper-class students, as it is tested on the New York bar examination.⁶ Many of our students thus take family law not because they want to but because they feel they have to. Many students (not all), also think of family law as “soft,” “emotional” and not “what real lawyers do”—not the equivalent of torts, contracts and commercial law in intellectual challenge and prestige in practice. In addition, for some of our students, family law practice (particularly divorce practice) has a vague reputation as attracting unethical, aggressive practitioners. Many of our students experienced the divorce of their own parents, or witnessed other family interactions with the legal system and do not have good memories. Fortunately, there are countervailing factors at Hofstra that made faculty colleagues and students receptive to our proposal for innovation in teaching the basic family law course. We have an interdisciplinary academic Center for Children, Families and the Law, a large number of faculty members interested in family law and alternative dispute resolution, and a rich family law curriculum with advanced courses, clinics and skills courses. We are the home base for *Family Court Review*, whose student staff regularly edits articles in the field and publishes notes on family law related topics. We also have a Child and Family Advocacy Fellowship which provides financial support for students committed to public service family law careers, as well as an LL.M. Program in Family Law. We tend to attract a significant number of students interested in family law careers.⁷

Our Law School’s curriculum committee suggested we add the “with Skills” title to family law when we proposed to add a credit to our traditional three-credit course to incorporate learning experiences for students designed to achieve the objectives set out by the *FLER Report*. The traditional three-credit course remains in the Hofstra Law School curriculum and still has many students who register for it rather than Family Law with Skills.

The different titles reflect the broader educational objectives of our new integrated skills course compared to the traditional course, whose principal aim is to familiarize students with applicable legal rules and doctrine (referred to in this article as “legal doctrine”). The *FLER Report* does not exempt law school family law courses from teaching legal doctrine. Indeed, it carefully notes that “a major task of family law professors is to introduce students to a body of law consisting of seminal cases, sample statutes, and regulations. Taken together, these legal building blocks form the basic architecture within which the practice of family law occurs and the rights and obligations of adults and children in relationships are constructed.”⁸ The educational challenge that the *FLER Report* and the *Carnegie Report* posed for us was how to promote our students’ professional skills development as part of, not separate from, their growth in understanding legal doctrine. That integration is what

effective family lawyers have to do to serve clients well. We cannot cheat either side of the educational equation.

Thus, we started from the premise that Family Law with Skills had to cover the same core legal doctrine material as the traditional three-credit course. The curriculum therefore includes marriage, common law marriage, domestic partnerships, cohabitation, grounds for divorce, parenting after divorce and separation (custody), child support, distribution of marital property and maintenance. We also cover the jurisdiction and organization of the family court, an introduction to the constitutional dimensions of parent-child relationships, domestic violence, child abuse and neglect, foster care, termination of parental rights, alternative reproduction, adoption and a bit about juvenile delinquency and status offenses. We also cover the ethical responsibilities of family lawyers, and alternative dispute resolution (including mediation and collaborative law) in family law. Family Law with Skills thus covers the subjects that the New York State Board of Law Examiners lists under the heading of “Matrimonial and Family Law” as possible areas of questioning on the New York State Bar plus some that are not on the bar examination list.

Depending on the professor, some or all of the above subjects are covered in traditional three-credit family law courses. What is unique about Family Law with Skills, however, is that the curriculum incorporates required exercises to introduce students to the skills and perspectives the *FLER Report* states lawyers need to prepare for modern family practice. For example, we require all students to make a field visit to family court and report back and reflect on what they observed. We require that students perform the skills of interviewing, counseling, negotiation, representation in mediation, working with a mental health expert, witness preparation, direct and cross examination and reviewing of draft agreements in complex simulated family law cases.

WHY DO IT? THE EDUCATIONAL BENEFITS OF FAMILY LAW WITH SKILLS

The next section of this article describes Family Law with Skills in detail and discusses how we try to achieve a balance between teaching doctrine and promoting professional skills development. This section discusses why we do it—what our experience tells us are the educational benefits of integrating the two. Our family law professor colleagues, of course, will appropriately ask why they should undertake the revision of their courses that FLER inspired us to undertake.

Frankly, it is less work and effort for us to teach a doctrinally oriented course on the one-teacher-with-a-case-book model, particularly when facing the prospect of creating skills exercises for large numbers of students. Creating effective skills exercises takes a good deal of planning and requires careful implementation. As we will discuss, we also need a lot of help from others to create an effective course. We note that law professors who want to integrate skills development into their courses do not have to do so with as many exercises as we created for Family Law with Skills. One or two exercises will help move their courses in a FLER like direction. But why do it at all? The short answer is that our experience indicates that integrating doctrine and skills development in a FLER influenced course has great educational benefits for law students including:

1. *FLER-Inspired Courses Elevate the Status of Family Law as a Career for Law Students*

Family Law with Skills honors and inspires students who take family law practice seriously and view it as a potential career. It is a “bridge to practice,” not just another course that students have to take to prepare for the bar.

The skills development exercises encourage students to recognize family law practice as a complex, challenging field requiring detailed doctrinal knowledge, sophisticated emotional intelligence and a very high level of professionalism. Family Law with Skills rejects the undercurrent in the legal profession that family law practice and courts are of lower status and importance than other legal specialties; if anything, Family Law with Skills students come to believe the opposite. They work harder than those who take the more traditional course but they benefit more—including a belief that

those who are suited to the field provide valuable service to families and children and can have a rewarding career.

2. *Bridges to Practice Inspire Better Doctrinal Learning*

Integrating skills exercises also improves the teaching of legal doctrine. Participation in skills exercises forces our students to integrate and review substantive doctrine because they perform before their teachers and classmates in simulated settings. They cannot wait until the final examination to review the subjects we discuss in class. Skills exercises also provide context for class discussions. These discussions are more passionate and sophisticated because our Family Law with Skills students bring their experiences in the course exercises to bear on them.

3. *Incorporating Skills Exercises into Doctrinal Courses Encourages Collaborative Learning*

Law school education generally emphasizes solo learning and evaluation of individual performance. A student reads a casebook on his or her own and takes an examination on his or her own. In contrast, our experience is that the best law practice is conducted in groups where lawyers can support and teach each other. The support of others is particularly necessary in the high stress family law practice where “burn out” from the intense emotions and demands is a constant danger.

Most of the skills development exercises that the students have to do in Family Law with Skills is done in groups—we assign students to firms and require the firm to complete tasks together. We have not done a formal survey of our students on the impact of having to work together in law firms. We do believe, however, that the impact is positive. Many students informally express their appreciation for the opportunity to work collaboratively with other students on these exercises. They feel that it helps their understanding of the doctrinal material, the importance of personal reputation in the profession, and also gives them the opportunity to bond as a class. In addition, it helps prepare them for working with colleagues in practice.

FAMILY LAW WITH SKILLS IN MORE DETAIL

Before describing Family Law with Skills in detail, it is important for readers to understand that the course is constantly evolving. Each year, we evaluate and modify it to add to the student’s educational experience within available resources. What follows is a description of our most current version in Spring Semester 2011.

A. SUBSTANTIVE COVERAGE AND DOCTRINALLY ORIENTED CLASSES

We cover the same doctrinal subjects as the traditional family law course, including all of the subjects that the bar examiners list under family and matrimonial law. We teach reasonably traditional classes on these subjects, devoting about the same amount of time to each subject as we do when we teach the three-credit course. We do emphasize the practice implications of doctrine, however, during the traditional classes. We discuss, for example, how important it is for parents to reach their own agreements on post-divorce children’s matters because of uncertainty about how flexible doctrine will be applied, the costs of litigation, and the greater likelihood of compliance if parents shape their own agreement.

We schedule the doctrinal topics so that classes on key matters are completed before the students perform a skill based exercise in the substantive area. For example, students learn the law of divorce (grounds, custody, child support, property distribution and maintenance) before they counsel a client on the client’s options. Students examine child abuse and neglect, the foster care system and termination of parental rights before they prepare a social worker for direct and cross examination at

a hearing on whether the child should be temporarily removed from her mother's care because of the mother's alleged neglect due to drug abuse. We advise the students that they are responsible for getting the legal doctrine we discuss in class "right" in their simulated exercises.

B. CASEBOOK

We use a casebook coauthored by a law professor colleague, Nancy Ver Steegh of William Mitchell, who is an active participant in the FLER Project.⁹ The casebook materials fit the emphasis of Family Law with Skills nicely because they emphasize how legal doctrine affects lawyer advice to clients. The casebook also has student friendly materials on ethics in family law practice and alternative dispute resolution, as well as the impact of social science research on family law. We also require our students to have a book of statutes relating to family law, which includes a number of key New York statutes, and to read appropriate sections, including the ones that will be central to their simulation exercises.

C. SKILLS ORIENTATION CLASSES

Most of our students have never performed the skills we ask them to perform in the simulated exercises and also have never seen a lawyer do so. We thus schedule classes that provide an overview of a particular skill before we ask the students to prepare for and conduct the exercise. Thus, we hold a class on the goals and techniques of interviewing before we ask the students to interview a client. The same is true for counseling, negotiation, mediation advocacy, trial techniques and drafting. We often show and analyze video excerpts of a lawyer performing the skill as part of the whole class discussion. Many times, the whole class discussion is led by a clinical professor with special expertise in an area. For example, Yishai Boyarin, a Clinical Professor who is the Director of Hofstra's Mediation Clinic, teaches the class on mediation advocacy. Yishai briefs the students on what to expect from the mediator and on planning strategy for the mediation session.

D. PLANNING FOR SKILLS PERFORMANCES AND SELF-EVALUATION

Students also complete a plan for each exercise (*e.g.* an interview plan describing what information they want to learn from the client or a counseling plan describing the client's dispute resolution, parenting and financial options and how the student will present them) for their Course Portfolio before the exercise. They also file a self-evaluation after the exercise describing what they think they did well and what they might do differently next time after they complete the exercise. The entire Course Portfolio is turned into us at the end of the semester and counts towards the student's grade in the course. We also conduct large class discussions of our own observations of student performance and what they are taking away from the exercise after the students complete their self-evaluations.

E. LAW FIRMS AND SENIOR PARTNERS

For the divorce related exercises, students are assigned to represent the husband or the wife in a simulated case. Students are also assigned to a law firm of approximately eight students all on the same side. The law firm is, in turn, assigned to a senior partner—an experienced member of the divorce bar that we believe is especially suited to teach law students. The goal of the law firm experience is to ensure that the students plan their lawyering skills performances carefully and in a supportive environment where their questions are answered and development as a lawyer encouraged.

The law firm senior partners, in effect, represent the profession and the private divorce bar to our students. Their job is to coach the student law firm to its best professional effort. Several of the senior

partners are alumni of our Law School and our former students. The senior partners have been extraordinarily generous with their time and knowledge over the years, as all we can offer them in compensation for their contributions to our students is affection, thanks and an occasional lunch. They seem to enjoy helping develop the generation of lawyers that will join them in practice. We try to fashion the demands that we place on them to their schedules, giving them ample advance-notice of law firm meetings and key dates. We keep their administrative responsibilities to an absolute minimum. We provide brief training for the senior partners and rotate into their classrooms for observation while they are conducting sessions with our students.

F. FAMILY COURT OBSERVATION

One of the first doctrinal topics we cover is the subject matter jurisdiction, philosophy, history, and organization of the family court (including trends in case load and resources). We also discuss the special ethical responsibilities of lawyers in family law cases early in the semester.

From student reactions to this material, we quickly learned that most of our students never observed any court proceeding, much less a family court session. For example, most of our students had no idea that:

- depending on the jurisdiction (some states don't have specialized family courts), matters heard in family court¹⁰ range from divorce and its consequences, to paternity, child support, custody and visitation, orders of protection for domestic violence, child abuse and neglect, foster care review, adoption, termination of parental rights, juvenile delinquency and PINS (Persons In Need for Supervision—status offenses for juveniles);
- family court decisions often focus on the rehabilitation of parties rather than simply the adjudication of a dispute;
- many family courts have adopted “problem solving” models for addressing problems such as domestic violence, truancy, drug abuse, and child abuse and neglect which dramatically changes the role of the judge from adjudicator to something like head of a treatment team that provides appropriate services and therapy;
- judges, not juries, determine contested facts;
- rules of evidence are relaxed;
- court procedures can be very informal;
- an individual case is part of a crowded docket that does not allow for much time for preparation and reflection;
- cases engage intense emotions, often displayed not only in the courtroom but also in the hallway outside the courtroom;
- parties often fend for themselves without legal representation;
- domestic violence, child abuse and neglect, drug abuse and mental illness often play a large role in family court proceedings;
- court staff, social service entities and mental health professionals responsible to the court play key roles in the case; and
- proceedings often take place in physical surroundings that can be grim, although some court-houses provide model environments for family law proceedings.

We thus decided to make a family court observation a mandatory course requirement. Students must do a minimum three-hour observation and a reflection paper on what they observed. They are free to observe any family court in any state or county. They usually wind up observing proceedings in our local Nassau County, New York courts. We find that the judges, attorneys, and court officers are glad to discuss the experience of their court with our law students and encourage the students to take advantage of the opportunity.

By requiring answers to specific questions, we ask students to provide enough detail in their reflection papers so that we can get a strong sense of what they observe. We ask them not to

identify litigants, court personnel or lawyers by name. We also ask students to reflect on the following questions:

- How did the family court that you observed differ from what you expected? What was the same?
- What did you observe about the clients, their lawyers, the judges, and court personnel both positive and negative?
- Based on your observations and the course material, what proposals would you make to change family court operations or procedures? Why?

The resulting student observation papers are worthy of a separate article. They report on a wide variety of proceedings in different family courts. Student reactions range from admiration for hard-pressed lawyers and judges who do their best under difficult circumstances in troubling physical environments, to condemnation for unprepared lawyers with cynical attitudes who do not represent their clients adequately, in the student's opinion. For present purposes, it is enough to note that they describe a vast range of family court cases, practices, attitudes and behavior—admirable and not so admirable—which are worthy of discussion and processing with the students to further their professional development.

Students value their observation experience highly, as a way of comparing and connecting their preconceptions and what they learn in the classroom to the “real world.” Many students make reference to what they observe during class discussions. We choose several papers for presentation at an in-class student panel with comments and questions from us and the rest of the class so that students can compare notes and normalize what they saw. This class is usually one of most engaging of the semester.

G. THE DIVORCE BASED SKILLS EXERCISES—INTERVIEWING, COUNSELING, NEGOTIATION, AND MEDIATION ADVOCACY

Divorce and its consequences (custody, child support, equitable distribution of property and maintenance) is a major doctrinal unit of every family law course and the bar examination. We require students to participate in simulated skills exercises based in the law of divorce—interviewing, counseling, negotiation, and mediation representation. All are based on a single case file—an upper middle class divorce with parenting and financial issues, which grows increasingly complicated as the exercises progress.

The case file is adopted from a longer one, which one of us coauthored, published by the National Institute for Trial Advocacy.¹¹ In brief, the husband in the case file is a radiologist and the wife is a radio executive who began her career after her children became older.¹² The husband has an affair with a lab assistant and wants a divorce in order to marry her. The wife has an affair with her boss, but is more ambivalent about the prospect of divorce. Despite constant arguments, husband and wife continue to live together in the same tension filled house. They have two children, a 12 years old girl who sides with the mother and a 10 years old boy who is more ambivalent and neutral between his parents. Both parents have been very involved with their children's upbringing and want to do so in the future. Both children exhibit declining school performance and symptoms of emotional distress—the girl, a gymnast, is borderline anorexic and the boy is wetting his bed. Both husband and wife want sole custody. The couple has substantial but not overwhelming financial assets, divergent career plans and needs for support.

Students engage in the following skills exercises:

1. Interviewing a client

The first exercise is to interview the husband or the wife as a new client on referral from another lawyer. Students are given a very limited amount of facts to work with. The focus of this exercise is to introduce the concept of fact gathering and relationship development through “active listening” to clients. This process encourages law students to ask open ended questions that follow on the client's

leads and use techniques like “restatement” of what a client says to help build a relationship of trust and confidence with the client. The student is also expected to discuss fees and retainer agreements with the client, the first such discussion in which most students have ever engaged. The client is played by a member of the law firm who is given confidential instructions.

2. *Client counseling*

This exercise focuses on encouraging young lawyers to engage in client-centered counseling—empowering clients to make informed choices among responsible options. We encourage students to identify the client’s goals and present clients with well-organized information and perspective. We also encourage our students to support client questions, engage in interactive dialogue and create an atmosphere where clients make their own decisions rather than have the lawyer tell the client what to do. For this exercise, students are given a much more detailed set of facts and financial statements, roughly equivalent to what they should gather from their client in a real matter before counseling begins. Students then meet in their law firms to analyze their client’s probable substantive law outcomes and dispute resolution options in light of the client’s expressed goals (which, as is typical of many divorce clients, can be contradictory—students learn clients do not like to make hard choices between career advancement and custody rights, for example). The law firms identify their client’s viable options and choices that the client must make. They then present their “counseling plan” to their senior partner who answers questions and makes suggestions for revision. The following week, under the observation of their senior partner, the student law firm counsels its client.

3. *Negotiation*

This exercise introduces students to the benefits and costs of different lawyer negotiation orientations generally encapsulated in the short hand of “problem solving” and “positional” negotiators. Following the counseling session, students get more information from their client about desired outcomes and goals—in effect, the client sets a prenegotiation bargaining range on major issues. The student law firm then develops a negotiation plan that it discusses with its senior partner. Students then attempt to negotiate for a settlement with a student lawyer representing the other side.

4. *Mediation Advocacy*

The goal of this exercise is to introduce students to what mediation is and the differences between advocacy in a mediation conference room and in a courtroom. Whether or not the students settle the dispute through negotiation, they are told to assume that they did not settle, that the divorce dispute is filed in court, and that the judge presiding over the case has ordered the parties to a mediation session in which lawyers will participate. The students receive a protocol for the mediation discussing issues like confidentiality of communications and the mediator’s professional orientation—facilitative, evaluative or transformative. In their law firms, the students plan strategy for the upcoming mediation session, including dividing responsibilities for presentations with their client, and discuss that strategy with their senior partner. Student teams of two with a student client then participate in a mediation session and rotate playing clients and lawyers. The mediators are students in our Law School mediation clinic who have been carefully briefed and trained by our Clinic Director. The senior partners observe and critique student performance at the session.

H. THE CHILD PROTECTION BASED SKILLS EXERCISES- DIRECT AND CROSS EXAMINATION OF A SOCIAL WORKER

We spend significant doctrinal class time on the child protection system—child abuse and neglect, foster care, termination of parental rights and adoption. We thought it important to have a skills

exercise based on those subjects, as they usually involve poor families of color, clients very different from the divorce clients of private practice and our divorce simulation.

We decided to tie the skills based exercise in the child protection area to trial skills. Most of the curriculum of Family Law with Skills stresses that lawyers should remind clients of the value of out of court settlement for family stability and long term relationships with children, and of the uses of alternative dispute methods to achieve those goals.¹³ Those same values apply in the child protection area.¹⁴ We are, however, acutely aware that not all cases settle or are suitable for alternative dispute resolution. We believe that law students who practice family law should be exposed to trial skills and hopefully use them only when other options are exhausted or inappropriate.

Our students thus participate in all-day trial practice based exercises, which we offer in conjunction with the Hunter University School of Social Work. Hunter requires selected social work students to participate in the exercises because of the importance that testimony at contested hearings plays in the professional lives of social workers in the child welfare system.

The exercises, created by our colleague, Theo Liebmann, a Clinical Professor and the Director of our Child Advocacy Clinic, are designed to simultaneously educate law students and social work students to effectively work together in the child protection system, especially at contested hearings. The exercises expose law students to child protection doctrine in more depth than is possible in the traditional classroom. But more importantly, the exercises expose law students to the importance and difficulties of interdisciplinary collaboration in family law cases. Law students are surprised, for example, to learn that many social workers do not like or trust lawyers, and that while social workers are mandated reporters of child abuse and neglect in New York, lawyers are not. They are also surprised to learn that many social workers view an addict's temporary relapse as a step in the recovery process, and not as a moral failing worthy of the termination of parental rights.

Specifically, the exercises seek to develop three important, inter-related competencies for both law students and social work students:

- (1) the ability to develop case theory and case planning strategies in a collaborative and interdisciplinary manner;
- (2) the ability to work together to prepare the presentation of persuasive testimony; and,
- (3) the ability to examine witnesses effectively (for attorneys) and to testify effectively (for social workers).

Faculty for the exercises are volunteers and are drawn from both law and social work; many have years of experience in the child protection system. Case file materials are distributed to all participants in advance, and Theo conducts a joint law-social faculty training session before the exercises begin.

The case file for the exercises is adapted from a longer case file published by the National Institute for Trial Advocacy designed to train child protection lawyers. Theo adapted that longer case file for a one-day intensive joint lawyer-social worker training program.¹⁵

The case file tells the story of the first few weeks of eight years old Eva Peña's contact with the child protection system up to the family court hearing to determine whether she should be placed in foster care. The students learn the story of Eva and her mother up to the point that DFS filed a petition in family court, alleging that Ms. Peña had neglected Eva by leaving her alone and by using drugs. At the initial court appearance, the court temporarily detained Eva in foster care. Two weeks later, the court is now holding a hearing on whether there are grounds to continue Eva's placement in foster care.

Law student teams of two are appointed to represent DFS, Eva, or Ms. Peña at the upcoming hearing. Each side has a social worker who will be called as a witness. DFS will call the social worker who directed the initial investigation and removal of Eva. Ms. Peña will call a social worker who is the clinical director of a drug treatment program in which she participates. Eva will call an investigative social worker hired by Eva's lawyer, who met with Eva and spoke with Eva's school guidance counselor and pediatrician over the phone.

Students participate in a few group lectures and view an overall demonstration of direct and cross-examination of a social worker. The core of the experience, however, is three simulated exercises conducted in small groups supervised by both a lawyer faculty member and a social work faculty member.

1. *Case Theory/Case Assessment*

This exercise is conducted by law students and social work students from the same “team” (Agency Lawyer/DFS social worker; Ms. Peña’s Lawyer/social worker drug program director; or Eva’s Lawyer/investigative social worker). Their job is to develop a “theory of the case.” Case theory is the blend of law, fact and strategy that establishes the framework for every part of the case from settlement negotiations, to witness examination, to closing arguments. In essence, a case theory is a convincing argument that your side should win. In the first part of this workshop, law students identify the key elements of the governing statute. Social work students and law students then work together to assemble facts into categories that support or detract from their team’s position on Eva’s return to her mother. The team then tries to assemble the factual and legal elements into a persuasive theory of the case.

2. *Witness Preparation*

The next exercise focuses on witness preparation. It begins with a facilitated discussion of the key aspects of good witness preparation, focusing on what information should be exchanged between the lawyer and social worker regarding courtroom procedures, practical concerns and testimony form and content. Social work students and the law students who will be calling the social work students as witnesses then work together to prepare the direct testimony, and to plan any anticipated cross examination. During the last portion of this exercise, a scenario that presents ethical challenges is discussed as a group.

3. *Trial Skills (Witness Examination and Testifying)*

In this culminating exercise, law students practice direct and cross examination, and social worker students practice testifying. The goals for the law students on direct examination include the use of short, newspaper style questions, use of simple language, exhaustion of topic, use of the persuasive aspects of witness accreditation, setting the scene and telling the action. On cross examination, we ask students to focus on witness control by using short, one fact declarative statements as leading questions. The goals for social work students include testimony through the use of plain language, adopting an appropriate demeanor, answering questions in a concise and direct manner, and answering only the question that is asked.

Participants break out into groups of six, with three lawyers (DFS lawyer, lawyer for Maria Peña, and lawyer for Eva Peña), and at least three social workers (DFS social worker, drug program director social worker and investigative social worker) in each group. Each social worker testifies and each lawyer conducts a direct and cross examination. The law and social work faculty provides feedback to each participant jointly.

I. THE SURROGACY BASED EXERCISE—DRAFTING SKILLS

Drafting documents (e.g. settlement agreements, stipulations and court orders) is an essential skill for family lawyers. We thus decided to add an exercise to highlight this fact and to provide a brief introduction to it.

We initially thought of basing a drafting development exercise in divorce doctrine. For example, we thought to require the students to draft a portion of a divorce settlement agreement on custody issues. Over the years, however, we concluded that students found doctrinal classes on surrogacy and

alternative reproduction complex, engaging and invigorating. We thought it would be valuable to capture their energy with a drafting exercise in that area. We thus decided to base the final skills exercise on developing drafting skills in the context of reviewing a draft of a surrogacy agreement.

The exercise, like all of the exercises in the course, occurs after we have completed the doctrinal unit on surrogacy. It thus forces students to review what we said in class and the complex laws that determine whether a surrogacy agreement is valid and enforceable in the course of improving their drafting skills.

We adapted the exercise from one created by our FLER colleague, Professor Naomi Cahn of George Washington, who uses a version of it in her own family law class.¹⁶ We enlist the help of Serge Martinez, a Clinical Professor who directs Hofstra's Community Development Clinic and is an excellent teacher of legal drafting.

Again, we assign the students to a law firm and require them to work collaboratively to complete their drafting exercise. Students receive an e-mail with an attachment from a senior partner of their firm. The e-mail informs the students that one of the firm's best clients has a daughter who wants to start a family with her husband, but the couple faces fertility issues and does not desire adoption. They have worked with The Fertility Center, a medical clinic that offers surrogacy services and all related medical services, and have identified a candidate to be a surrogate mother. The lawyers are given details about the client's expectations for, and arrangements with, the surrogate. The lawyers are informed that The Fertility Center has asked the daughter and her husband to sign a contract with the surrogate candidate before the Fertility Center will proceed any further. The Fertility Center has provided them with a suggested agreement, which is transmitted with the e-mail.

The senior partner then asks the student law firm to review the draft agreement and provide advice in anticipation of a soon-to-be-held meeting with the daughter and her husband. The students are instructed as follows:

Mark up the language in the sample agreement with the three main issues that concern you, explaining why you have flagged each provision. Please be sure to describe the suggested changes in complete detail (*e.g.*, whether these changes are insertions or deletions and the language that is being deleted and/or replaced). Explain the rationale behind each suggested change and how the change will protect or serve [client's daughter and her husband's] needs and interests. Discuss why each area needs to be addressed, the likely risks in failing to address this issue and the benefits of the suggested change; make a list of additional questions that we need to address with [client's daughter and her husband] including: provisions that may need to be added, information that you need to complete your review of the contract; and provide a written recommendation concerning the circumstances under which [client daughter and her husband] should sign the agreement.

The draft agreement for review is riddled with clauses that are difficult to understand, and many of which are inapplicable because they are taken from a formbook and are not personalized to the needs of the clients.

Before the student law firms begin their assignment, Serge conducts a class on the essential skills involved in drafting agreements and client communications. He emphasizes certain key issues in transactional lawyering: translating legal concepts into plain, understandable language; the importance of "fairness" (to whom? why?); and understanding what clients expect from a lawyer in the drafting process. He notes the duty to ensure that agreements comply with applicable law. After the student law firms submit their memos, Serge reviews them with us, and selects key passages for class discussion. At the next class, he puts the selected samples on the video screen, illustrates both good resolutions and problematic ones and makes concrete suggestions for improvement.

Some key additional administrative details about Family Law with Skills:

J. CREDITS

Since we were adding professional skills instruction to the traditional three-credit doctrinal family law course, our colleagues agreed to increase the credits offered to four. Our Law School also has a

skills requirement which requires that students take two credits of skills-based instruction for graduation. Family Law with Skills satisfies that requirement.

K. TEACHING FELLOW

Family Law with Skills requires the coordination of materials for distribution, posting materials on our TWEN site, setting up court observations, arranging the full day program with the Hunter School of Social Work, the assignment of students and practitioners to law firms, student submissions, room reservations, etc. We quickly found that we were simply not capable of administering the complexities of the course without help. We therefore recruit a third-year law student who previously took the course and designate him/her as a teaching fellow to perform these tasks under our supervision. Our teaching fellow is also a liaison to our students—he/she tells us what the students are experiencing and makes sure to represent the students’ interests in any administrative decision that we make. We could not offer this course without the Teaching Fellow’s help.¹⁷

L. SCHEDULING

Doctrinal classes take place in two 90-minute classes a week. The skills exercises are generally scheduled for a two-hour block on Friday afternoons when more rooms are available in the Law School. We hold the trial practice exercises on an all-day Saturday session.

M. GRADING AND EVALUATION

A student’s final grade in Family Law with Skills is largely based on a final examination. It is also subject to Law School grading curve requirements. To some extent, the need to grade students in this way detracts from the collaborative, supportive learning environment that we believe the skills exercises in the course fosters.

Student performance on the skills exercises should not be graded on the same scale that we use to grade their final examinations. We do not want students to be afraid to make mistakes or to experiment. We are concerned about subjectivity on our part (we could not grade them anonymously), and that grading would discourage risk taking by students during skills performances.

On the other hand, we want our students to take their participation in the skills exercises seriously. Therefore, we provide the following statement to the students about the effect of participation in skills exercises on their final grade in the course:

“If you participate meaningfully in each skills exercise, and contribute meaningfully (a judgment that is within our discretion) to the work of your law firm discussion, you will receive credit for participation. We reserve the right to raise or lower your final grade a level for either outstanding performance in the skills exercises or failure to participate meaningfully.”

STUDENT REACTIONS AND EVALUATIONS

Our belief that students benefit from Family Law with Skills is impressionist, not empirical. We have not conducted a methodologically rigorous evaluation of student reaction and performance in Family Law with Skills as compared to their reactions to the traditional family law courses. Nor have we conducted a study comparing how well our Family Law with Skills students learn doctrine as compared to those in more traditional courses, or how our students’ views of family law practice change from the beginning of the course to the end.

Instead, we base our sense of how students react to the course on extensive conversations with them and on Hofstra’s student evaluation process. We asked our students to comment on the course anonymously, with specific feedback on aspects of the course and suggestions for improvement.

Regarding the impact on their future family law practice, students told us that the course helped them to appreciate the changing nature of family law. Some students pointed out certain aspects of family law practice, for example: “This course introduced me to the growing importance of collaborative law and its critical role in family law cases. I am interested in learning more about this area of law so I can provide it as an option for clients.”¹⁸ When asked how the course differed from other law school courses, students observed that the course was “much more hands on and interactive,” and that it gave them “the opportunity to apply what I learned in the classroom in a practical setting and to interact with individuals from other professions that collaborate with family law lawyers on a daily basis.” Students reported that they appreciated the integration of skills practice, court observation, and substantive doctrine because the combination “put the material in context, and allowed me to gain a different perspective” and “gave real insight into the challenges of the court system and client issues.”

The Hofstra evaluation forms have a numerical component and a section where students can make free form comments. The last year for which we have complete numerical evaluations is 2009, as the evaluations for this year’s offering are not yet compiled. On a scale of 1 to 5, the students rated Family Law with Skills 4.61 on the degree to which the course improved their ability to analyze legal problems; 4.76 on the degree to which the course taught a great deal about this area of law; and 4.68 on the degree to which the course made a valuable contribution to their education. Our Research Assistant’s summary of the anonymous comments on the student evaluation forms indicates:

“An overwhelming majority of the students enjoyed the class because of its real world applicability. The skills exercises either honed their skills as lawyers or pointed out weak points that needed to be addressed. Most talked about the benefits from the mediation exercise since it allowed them to improve their interviewing and counseling techniques. Others enjoyed the direct and cross from the Hunter College exercise. The oversight from the senior partners seemed to provide the students with useful feedback on how to improve their skills as well as give the students tips from first hand experiences. Overall, the students benefitted from the different approaches and practicality of the class.”

ADDITIONAL TAKEAWAYS

We draw two final lessons from our Family Law with Skills experience:

- *Teaching Family Law with Skills requires collaboration and cooperation.*

The one-teacher-with-a-case-book model of law school education simply does not work for a FLER-inspired course. Teaching Family Law with Skills, like modern family law practice, requires collaboration with and help from others. The coordination and additional effort required redounds to the benefit of the students, who see the faculty practice the cooperative behaviors we preach.

Like any other law professor, we are responsible for creating the course curriculum, planning the skills exercises, constructing the final, and grading the students. We have, however, also come to view our role in Family Law with Skills more broadly. In addition to teaching, we create bridges to the world of family law practice for our students to cross so that they can begin to explore their professional futures on the other side. We recruit and coordinate help from the profession and family court stakeholders to design and construct those bridges. It is a team effort to educate the next generation of family law practitioners.

- *Family Law with Skills is a foundation for lifetime professional learning.*

Students who cross the bridges to modern family law practice that we construct in Family Law with Skills are not, however, fully experienced travelers; they are not competent to practice family law simply by taking our course. Indeed, our experience with Family Law with Skills reinforces our conviction that practicing family law is essential, complex and demanding. It is also not “one

thing”—family law practice is filled with different specialized practice settings ranging from divorce lawyers representing high (or low) income clients in private practice to legal aid lawyers representing poor persons of color (or not) involved in child abuse and neglect proceedings. Whatever their area of specialization, family lawyers have to master a complex and continually evolving body of knowledge. In addition, they have to develop the capacity to work in an environment loaded with strong emotions and reactions and still keep their cool.

No single course, however enriched, can assure that a law student develops all the complex competencies necessary to be an effective family law practitioner. For example, we believe that the ability to deal with the emotions of others in a legal context increases with a lawyer’s own maturity and ability to self reflect. We advise our students that Family Law with Skills is simply an introduction to the wonderful world of family law practice. They will have the obligation to continue to educate themselves and develop if they go into the field. As mentioned previously, Hofstra fortunately has a rich variety of additional courses, externships, and projects to offer them, and the bar and family court stakeholders have been welcoming to our students.

We do not, however, want to underestimate the importance of an introductory family law course that merges doctrine and professional skills development. We believe that Family Law with Skills is an effective foundation for our students’ later professional development in law school and beyond. We greatly enjoyed creating the course and believe that our students and the field benefit from it. Our experience affirms the final words of the *FLER Report*—“None of this is impossible. Much of what is missing in contemporary family law courses can be borrowed and adapted from other fields. If the enthusiasm of the FLER Project’s participants is any gauge, this is a challenge that can be met.”¹⁹

NOTES

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1. Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 547 (2006) [hereinafter *FLER Report*].

2. *Id.* at 528.

3. *Id.* at 547.

4. WILLIAM M. SULLIVAN ET. AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 4 (2007).

5. *Id.*

6. NEW YORK STATE BOARD OF LAW EXAMINERS, *CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAMINATION (UPDATED MAY, 2010)*, available at [http://www.nybarexam.org/Docs/CONTENT%20OUTLINE%20\(revised%20May%202010\).pdf](http://www.nybarexam.org/Docs/CONTENT%20OUTLINE%20(revised%20May%202010).pdf) (last visited May 23, 2011).

7. See NEW YORK CITY BAR ASSOCIATION, COMMITTEE ON FAMILY COURT AND FAMILY LAW SURVEY OF FAMILY LAW CURRICULA IN NEW YORK CITY AND LONG ISLAND LAW SCHOOLS (Jan. 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071797-surveyofFamilyLawCurriculainNYCandLongIslandLawSchoolsReport.pdf> (last visited May 26, 2010) (report on survey of New York City area law schools family law related courses and activities)

8. *FLER Report*, *supra* note 1, at 527.

9. ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* (2d ed. 2008).

10. New York has a particularly difficult family court system to explain. Our state divides subject matter jurisdiction in family related cases between a family court (which hears orders of protection, juvenile delinquency, custody modification, adoptions, child abuse and neglect, PINS cases etc.) and a supreme court (called the superior court in most other states) which grants divorces and provides associated relief such as equitable distribution of marital property, maintenance, custody of children and child support. Individual families often have cases going on in both courts simultaneously.

11. ANDREW. I. SCHEPARD *ET AL*, *ALLEN V. ALLEN: CASE FILE AND PROBLEMS* (National Institute for Trial Advocacy 2006).

12. Course materials are posted at the Family Law Education Reform Project website under “Simulation Exercises” <http://flerproject.org/?q=node/19>, Number 6 “Family Law With Skills Instruction.”

13. See Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on The Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 667 (2007) (symposium issue).

14. See *Special Issue: Mediation and Conferencing in Child Protection Disputes*, 47 FAM. CT. REV. 7 *et. seq.* (2009).

15. Diane C. Geraghty, Thomas F. Geraghty & Angela Vigil, In Re Pena Case File (NITA 2003); *see also* Interdisciplinary Collaboration in Dependency Cases Course Packet, *available at* http://calswec.berkeley.edu/CalSWEC/AffectLegalOut_Pena_Acknowl_CourtPro.doc

16. See Naomi Cahn, *G.W. Surrogacy Exercise Book*, www.flerproject.org/doc/000035-Surrogacy_Exercise_Book_noredline.doc

17. We have been blessed by the assistance of wonderful Teaching Assistants each of the first three years of this curricular experiment: Christena Vitkovich, Shana Barone, and Stephanie Conti.

18. We thank Robert Castillo and Trinh Tran, Hofstra Law School, both Class of 2012 for their help in compiling a summary of evaluations.

19. *FLER Report*, *supra* note 1, at 548.

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